

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTHONY DANIEL BEJARANO JR.,
Petitioner.

No. 2 CA-CR 2019-0135
Filed October 9, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Graham County
No. CR201800053
The Honorable Michael D. Peterson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Elizabeth M. Hale, Lakeside
Counsel for Petitioner

STATE v. BEJARANO
Decision of the Court

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

ECKERSTROM, Judge:

¶1 Anthony Bejarano Jr. seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Bejarano has not shown such abuse here.

¶2 In 2018, Bejarano pled guilty to aggravated assault, possession of drug paraphernalia, and driving with an illegal drug or its metabolite in his body. The charges stemmed from an incident in February 2017 in which Bejarano ran a stop sign and struck the victim's vehicle with his car, causing it to roll and seriously injuring the driver. Drug paraphernalia and two handguns were found in his car, and he tested positive for methamphetamine and Carboxy-THC. The trial court sentenced Bejarano to an aggravated, seven-year prison term for aggravated assault. The court found as aggravating factors Bejarano's possession of a firearm, as well as property damage and harm to the victim. It cited as mitigating factors Bejarano's family support and lack of felony history. For the remaining counts, the court suspended the imposition of sentence and placed Bejarano on concurrent terms of probation to follow his prison term, the longer of which is two years.

¶3 Bejarano sought post-conviction relief, arguing the trial court had erred in imposing an aggravated sentence for aggravated assault. He asserted the court had not considered "all the mitigating factors presented" and had "improperly considered" as aggravating his possession of a firearm. The court summarily denied relief, and this petition for review followed.

¶4 On review, Bejarano again asserts the trial court failed to "give adequate weight" to mitigating factors. He lists several potential mitigating factors not expressly identified by the trial court, including his "remorse for the victims," "compliance with law enforcement," and "lack

STATE v. BEJARANO
Decision of the Court

of actual impairment.” Bejarano’s trial counsel articulated these factors at sentencing, insisting that the collision was just a “very, very unfortunate accident.”

¶5 We presume a sentencing court considered any mitigating evidence presented, *State v. Everhart*, 169 Ariz. 404, 407 (App. 1991), and we leave to the court’s sound discretion how much weight to give any such evidence, *State v. Cazares*, 205 Ariz. 425, ¶ 8 (App. 2003). Further, a court “is not required to articulate any factual findings as to mitigating factors which it does not find to be true or which will not be relied upon in sentencing a defendant.” *State v. Cid*, 181 Ariz. 496, 501 (App. 1995). We note, first, that irrespective of Bejarano’s attempt to minimize his conduct as an “accident,” he admitted having acted recklessly – that is, with a conscious disregard of a substantial and unjustified risk. See A.R.S. §§ 13-105(10)(c), 13-1203(A)(1), 13-1204(A)(4). Particularly in light of the grievous injuries the victim suffered because of that recklessness, Bejarano has identified no basis for us to disturb the court’s weighing of sentencing factors here.

¶6 Bejarano also asserts the trial court erred in relying on his possession of a firearm as an aggravating factor. Section 13-701(D)(2) lists as an aggravating factor the “possession of a deadly weapon or dangerous instrument during the commission of the crime.” Bejarano contends that mere “constructive possession” is insufficient. But he has cited no supporting authority, and his position is contrary to established law. Our definitions of “possess” and “possession” make no distinction between actual or constructive possession. *State v. Gonsalves*, 231 Ariz. 521, ¶ 9 (App. 2013); see also § 13-105(34), (35). Nor does Bejarano support his argument that the court should have disregarded § 13-701(D)(2) because he “was not a prohibited possessor” and did not use the gun “during the assault.” See *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). In any event, the trial court gave this factor little weight at sentencing, focusing on the victim’s injuries and property damage.

¶7 In sum, Bejarano has not established the court abused its discretion at sentencing or in rejecting his claim for post-conviction relief. Accordingly, although we grant review, we deny relief.